STATE OF MICHIGAN

IN THE SUPREME COURT

BARBARA STANISZ,

Plaintiff-Appellee,

v

FEDERAL EXPRESS CORPORATION, a Delaware corporation, and DENNIS MARKEY, an individual,

Defendants-Appellants.

Supreme Court
Case No. 124377
Court of Appeals
Case No. 236371

Saginaw County Circuit Court
Civil Action No. 99-29224-CZ-4
Hon William A. Crane

/

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PLAINTIFF/APPELLEE'S RESPONSE TO APPLICATION FOR LEAVE TO APPEAL

EXHIBITS TO RESPONSE

PROOF OF SERVICE

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RESPONSE TO DEFENDANT'S STATED "GROUNDS FOR APPEAL"

A review of the issues raised by defendant in its Application for Leave to Appeal makes it clear that they are neither novel nor significant and should not be reviewed by this Court. Defendant asks the Court to use its limited and valuable resources to address two issues that are not properly preserved for appeal: (1) an alleged defect in a special jury verdict form which defendant reviewed and approved at trial and (2) an attorney fee issue raised for the first time in defendant's Application for Leave to Appeal to this Court.

The Application should therefore be denied not only because there is no merit to defendant's legal arguments, but also because this case does not meet any of the criteria for granting leave to appeal set forth in MCR 7.302 (B).

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. THIS COURT SHOULD NOT REVIEW DEFENDANT'S ARGUMENT REGARDING AN ALLEGED DEFECT IN THE SPECIAL VERDICT FORM, WHERE THE COURT OF APPEALS PROPERLY HELD THAT THIS ISSUE WAS WAIVED IN THE TRIAL COURT BY DEFENDANT'S EXPRESS APPROVAL OF THE FORM.

II WHETHER THE COURT OF APPEALS PROPERLY FOUND THAT PLAINTIFF'S SEX DISCRIMINATION CLAIM AND SEXUAL HARASSMENT CLAIM WERE BASED ON EVIDENCE OF THE SAME CONDUCT, THEREBY SUPPORTING THE ENTIRE DAMAGE AWARD.

III WHETHER THIS COURT SHOULD CONSIDER DEFENDANT'S REQUEST FOR A REMAND ON AN ATTORNEY FEE ISSUE THAT IS RAISED FOR THE FIRST TIME IN THIS COURT.

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COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

A. Introduction.

Plaintiff Barbara Stanisz filed this action against her former employer, Federal Express Corporation ("Federal Express"), because it discriminated against her based on her sex, engaged in sexual harassment by permitting her to be subjected to a hostile work environment and retaliated against her when she voiced her opposition to these violations of the Elliott-Larsen Civil Rights Act. Plaintiff also filed an assault claim against Defendant Dennis Markey in his individual capacity.

Plaintiff filed this action on July 21, 1999. The case was tried to a jury in the Saginaw County Circuit Court. On March 9, 2001, the jury returned a verdict awarding the Plaintiff $1,963,000 in damages. The verdict was returned on a special verdict form that was approved at trial by both plaintiff and defendants. The special verdict by the jury included $96,000 in back pay, $342,000 in front pay, $1,000,000 in past emotional distress damages and $500,000 in future emotional distress damages and $25,000 for the assault by Defendant Markey. (Trial Transcript 3/9/01 at p. 138.) (Special Verdict Form, Exhibit 1.) The Judgment in this matter was entered on March 26, 2001 together with the Court's Order granting Plaintiff's reasonable attorney's fees.

Defendants filed a post-trial Motion for Judgment Notwithstanding the Verdict, New Trial and Remittitur on April 16, 2001. On July 20, 2001, the Trial Court issued its Opinion and Order on Defendant's post-trial motion, ordering a new trial on the question of non-economic damages, unless the Plaintiff agreed to remit the amount awarded for past and future non-economic damages against Federal Express to the amount of $600,000, within fourteen days. On August 2, 2001, Plaintiff filed its remittitur with respect to the reduction of non-economic damages.

Defendants filed their Claim of Appeal in the Michigan Court of Appeals on August 24, 2001. On July 15, 2003, the Michigan Court of Appeals issued an unpublished, per curium opinion in which it upheld the judgment on plaintiff's sex discrimination and retaliation claims, but reversed on the sexual harassment theory, relying on a new Michigan Supreme Court decision that was

decided shortly before the Court of Appeals oral argument. Significantly, the Court of Appeals upheld the trial court's total damage award, as remitted, despite the reversal on this single theory of liability. (Court of Appeals Opinion, Exhibit 2.)

B. Counter-Statement of Facts.

The Court of Appeals' opinion contains an extensive recitation of the facts proven at trial which support the trial court's Judgment. In fact, that Court found the conduct of defendants "deplorable." Opinion, p 9. Some of the pertinent facts are re-stated here.

Plaintiff was initially hired by Federal Express on or about April 4, 1990 as the Operation's Manger for the Ann Arbor station, at a salary of approximately $35,000 per year. (Trial Transcript 02/28/01 at pp. 141-142, Plaintiff's Exhibit 1.) As a result of her excellent performance, Plaintiff was promoted to the position as station manager for the Muskegon station in September of 1993. (Trial Transcript 02/28/01 at pp. 152-153.)

In approximately August of 1995, Plaintiff was contacted by Ron Williams, the Managing Director of the Michigan District for Federal Express. (Trial Transcript 02/28/01 at p. 163.) Williams told Stanisz that he needed her to go to Saginaw and that there was an opening for a senior manager at the Saginaw station (MBS station) for which he wanted her to apply. (Trial Transcript at 02/28/01 at pp. 163-165.) Williams told her that there were multiple outstanding complaints of sexual harassment by females at the station and it was in tough shape and he needed it fixed. (Trial Transcript 02/28/01 at p. 165.) Williams told her that the two operations managers, Ron Riever and Randy Romaine had problems with their ethics and their leadership as it related to women in particular. (Trial Transcript 02/28/01 at pp. 165-166.) He also told her that it was one of the two worst performing stations in the Michigan District. (Trial Transcript 02/28/01 at p. 169, Plaintiff's Exhibit 13.) Williams told her that he needed her to go in, make the necessary corrections and fix the station. (Trial Transcript 02/28/01 at p. 165.) Stanisz was formally offered the position as Senior Manager for the MBS station on September 11, 1995.

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Plaintiff performed well in her role as senior manager for the troubled station during the period that Ron Williams was the director of the Michigan District, and he gave the Plaintiff a good performance evaluation. Likewise, Williams' successor as the director of the Michigan District, Michael Reed also gave Plaintiff very good performance reviews during the period that she reported to Reed. In fact, Reed testified that under Stanisz's leadership she was able to turn the MBS station's performance around from one of the worst of the 22 stations in the Michigan District (Trial Transcript at 03/01/01 at p. 160) to one of the top five stations in the district. (Trial Transcript at 03/01/01 at p.167.)

Throughout Plaintiff's tenure as Senior Manager at MBS Dennis Markey, a courier at the station was a continual problem for the women at the station. When Stanisz began as Senior Manager, Markey did not report directly to Stanisz and was still reporting to Ron Riever. (Trial Transcript at 02/28/01 at p. 178.) After Riever was removed as operations manager, Markey attempted to make Plaintiff's life miserable. He repeatedly told Plaintiff that she had no business being named as senior manager at the station and that the company only put a woman in there to satisfy all of the other crying women at the station. (Trial Transcript at 02/28/01 at p. 179.) He told Stanisz that she did not deserve the job and did not belong in it. (Trial Transcript at 02/28/01 at p. 179.) When Stanisz attempted to give Markey direction or supervision, Markey was argumentative and told her that he did not have to listen to her because she was a woman. (Trial Transcript at 02/28/01 at pp. 179-180.) He also told other couriers that they did not have to listen to the Plaintiff or do what she said because she was only a woman. (Trial Transcript at 02/28/01 at pp. 181-182.) In a discipline meeting with the Plaintiff, Markey ignored the discipline issues relating to a physician's excuse and drew a picture of his penis and explained to the Plaintiff that she would never understand how important a man's penis is to a man because she was a woman. (Trial Transcript at 02/28/01 at p. 187.) Markey's poor treatment was not limited to the Plaintiff but was also directed to the other females at the station.

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After observing Markey's behavior and hearing the complaints from the other females in the station Stanisz contacted the senior manager for personnel of the Michigan District, Patrick Passanante. (Trial Transcript at 03/01/01 at p. 37.) She told Passanante that Markey refused to cooperate with females. (Trial Transcript at 03/01/01 at p. 38.) She also told Passanante about the discriminatory comments that Markey had made to her regarding the fact that he was not going to follow her direction because she was a woman and his other anti-female comments. (Trial Transcript at 03/01/01 at p. 39.) In fact, she repeatedly told Passanante that under her understanding of the company's sexual harassment policy, Markey was creating a hostile environment for the women around him including herself. (Trial Transcript at 03/01/01 at p. 40.) During her numerous discussions with Passanante about Markey he regularly sided with Markey telling the Plaintiff that she was an overbearing woman and that she better be worried about her own conduct rather than Markey's. (Trial Transcript at 03/01/01 at pp. 40-41.) He also told her that as far as he was concerned Stanisz was the problem and that he was not even going to bother to investigate her complaints. (Trial Transcript at 03/01/01 at p. 41.)

Markey's behavior and comments became worse, especially in late 1997 and early 1998 (Trial Transcript 02/28/01 at pp. 187-188). During that period Markey told Stanisz that he did not have to do anything that she told him to do (Trial Transcript 02/28/01 at p. 188). He also told her that she was just a "helpless female" who really did not know who was in charge at the station. (Trial Transcript 02/28/01 at p. 188.) He threatened her telling her "Patrick and I together are going to have your job, you're just a stupid woman" (Trial Transcript 02/28/01 at p. 188).

Stanisz's continuing complaints to Passanante failed to result in any support (Trial Transcript 03/01/01 at pp. 40-41). In fact, by the summer of 1998, Markey was refusing to meet with either of the female managers, Barbara Stanisz or Kathy Parker (Trial Transcript 03/08/01 at pp. 175-176; Trial Transcript 03/01/01 at pp. 52-53; Plaintiff's Exhibit 24).

Finally, in July of 1998, Markey got completely out of control and came after Stanisz physically (Trial Transcript 03/01/01 at pp. 64-65). Stanisz immediately reported the incident to Dan O'Brien, the local personnel representative at the MBS station. (Trial Transcript 03/01/01 at pp. 66-67.) O'Brien told Stanisz that she would have to report this to Patrick Passanante and that there was nothing he could do for her. (Trial Transcript 03/01/01 at p. 67.)

Stanisz then contacted Passanante, reported the incident and that told him she was concerned for her safety. (Trial Transcript 03/01/01 at p. 68.) She told him that Markey was out of control and openly defiant telling people they didn't have to do what management said, that he was going to get the female managers fired and they were just stupid women that did not know who was truly in control. (Trial Transcript 03/01/01 at p. 68.) Passanante told Stanisz that she just had to put up with it and also told her that he was not even going to come out and do an investigation of the incident. (Trial Transcript 03/01/01 at p. 68.) He told Stanisz that he felt that she was at fault. (Trial Transcript 03/01/01 at p. 68.)

In approximately March or April of 1998, Markey had filed a claim under the Guaranteed Fair Treatment Procedure ("GFT") challenging his performance review for 1998. (Trial Transcript 03/01/01 at p. 71.) The GFT procedure is a procedure that any employee at Federal Express can use to review management decisions. (Trial Transcript 03/02/01 at p. 125.)

On September 21 Plaintiff participated in a conference call regarding Markey's performance review with Thornton, Passanante and Reed. (Trial Transcript 03/01/01 at p. 98.) Stanisz attempted to explain what had occurred with Markey's performance review but she was cut off by Thornton who would not allow her to finish her sentences. (Trial Transcript 03/01/01 at p. 91.) She explained that Markey had multiple performance difficulties and that his behavior was such that she had gotten complaints from female employees that Markey was creating a hostile work environment for Stanisz and the other females also. (Trial Transcript 03/01/01 at p. 92.) Thornton cut her off and told her

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that both he and Patrick Passanante believed that Stanisz was a "controlling woman," that she was the problem and he did not want to hear any of her explanations. (Trial Transcript 03/01/01 at p. 92.)

Subsequently, Plaintiff met with Mike Reed in Saginaw to go over her own performance review. Although there were two performance reviews in Fed Ex's file (Plaintiff's Exhibits 31 and 32) which gave Plaintiff different ratings, both performance reviews were very positive. Reed then inexplicably received a written directive from Thornton directing him that Stanisz was to be suspended and investigated based on the conference call and a related complaint about Markey. (Plaintiff's Exhibit 79.) Reed complied with the Thornton directive and prepared his letter to Stanisz notifying her that she was being suspended for an investigation into possible "leadership failure." (Plaintiff's Exhibit 33.)

On October 15, 1998, Stanisz filed an internal EEO complaint with Federal Express complaining about the discriminatory treatment she had received as well as her suspension and the investigation into possible leadership failure. (Trial Transcript 03/01/01 at pp. 112-113; Plaintiff's Exhibit 34) Federal Express never even bothered to interview witnesses or investigate Stanisz's EEO complaint. (Trial Transcript 03/01/01 at p. 134.)

Unfortunately for Stanisz the investigation into her leadership failure was a sham with a pre-ordained result. On November 2, 1998 Plaintiff met with Mike Reed who told her that the investigation had been completed, that she had been found guilty of leadership failure and she had two options, either resign or be demoted to an operations manager in the Farmington Hills office. (Trial Transcript 03/01/01 at pp. 119-120; Plaintiff's Exhibit 37.) He also told her that because the move to Farmington was a demotion the company would not pay any moving costs. (Trial Transcript 03/01/01 at pp. 120-121.) On November 9, 1998 Reed forwarded the proposed severance agreement to the Plaintiff. (Plaintiff's Exhibit 38.) Stanisz refused the severance agreement as she did not feel she had done anything wrong. (Trial Transcript 03/01/01 at p. 123.) She communicated her dissatisfaction with her situation at Federal Express to the CEO of the company as well as the

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senior vice president. (Plaintiff's Exhibits 39 and 40.) In both letters she noted that she had filed an internal EEO complaint regarding the shabby treatment which she had received.

On November 24, 1998, Plaintiff was officially demoted as a result of her "unacceptable conduct and poor leadership judgment" and advised to report to the Farmington Hills office for her new assignment. (Plaintiff's Exhibit 42.) Upon receipt of the demotion letter, Stanisz contacted Reed's secretary and asked for a couple of extra days before reporting to work so she could make arrangements for her children because of the drive and handle some doctors appointments. (Trial Transcript 03/01/01 at p. 128.) After she indicated interest in the Farmington Hills job, she was advised by the secretary that Reed had no problem with her taking two additional days, but advised her that instead of reporting to the Farmington Hills office she would have to report to work as an operations manager at the Romulus station which was even further from her home. (Trial Transcript 03/01/01 at pp. 129-130.) The change in location had also been mandated to Reed by Matthew Thornton. (Trial Transcript 03/01/01 at pp. 206-207.)

After reflecting on what had happened to her, realizing that the Romulus station was 137 miles away from her home, each way, Federal Express was not offering to move her family, and that she would still be in Thornton's and Passanante's district, Stanisz told Federal Express that it was obvious that Federal Express was attempting to force her out of the company and that she would not report to the Romulus station. (Trial Transcript 03/01/01 at pp. 129-130; Plaintiff's Exhibit 43.) Finally, Stanisz received a letter dated December 3, 1998 advising her that Federal Express had terminated her employment. (Trial Transcript 03/01/01 at pp. 133-134; Plaintiff's Exhibit 44.)

As a result of Defendants' discriminatory, retaliatory and wrongful actions, Plaintiff was separated from her employment and suffered substantial economic and non-economic damages. Based on the evidence and testimony, the jury awarded the Plaintiff $438,000 in economic damages and $1 million for mental anguish and emotional distress damages through the date of trial and an

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additional $500,000 in future emotional distress and mental anguish.[1] (Trial Transcript 03/09/01 at p. 138.) The verdict was later remitted, as set forth above.

C. The Court of Appeals' Decision.

Significant to defendant's current Application for Leave to Appeal are just two issues raised in the Court of Appeals. First, defendant argued, as it did in the trial court, that plaintiff had failed to present a prima facie case of sexual harassment. Plaintiff's sexual harassment claim was based on her claim that she was subjected to gender-based harassment, not harassment of a sexual nature.

While defendant's appeal was pending before the Court of Appeals, this Court issued its precedent-setting decision in Haynie v State of Michigan, 468 Mich 302; 664 NW2d 129 (2003) in which it held that gender-based harassment is not sufficient to establish a claim of sexual harassment under the Civil Rights Act, MCLA 37.2101, *et seq*. Relying on this new decision, defendant argued that the trial court's denial of defendant's Motion for Summary Disposition on plaintiff's sexual harassment claim should be reversed.

Second, defendant argued that if the Court of Appeals reversed on the sexual harassment issue, remand would be necessary . Defendant claimed that since the special jury verdict form used at trial separated plaintiff's theories of liability but did not separate damages, remand was necessary for a determination as to how much of plaintiff's damages were attributable to her sexual harassment claim.[2]

The per curium opinion issued by the Court of Appeals on July 15, 2003 affirmed the trial court in all respects except for the sexual harassment issue. Following Haynie, the Court reversed

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[1] The factual basis for plaintiff's economic and non-economic damages were extensively briefed in the Court of Appeals. That Court specifically held that the damages awarded in the trial court's final Judgment were fully supported by the evidence.

[2] There are no references to these issues in the parties' briefs filed in the Court of Appeals. Since Haynie was decided shortly before oral argument, the issues were raised for the first time at hearing and were not briefed.

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the trial court's denial of defendant's Motion for Summary Disposition on the sexual harassment claim. The Court of Appeals held:

> After reviewing the record, although we find the treatment suffered by plaintiff to be deplorable, the conduct or communication at issue was gender-based but not sexual in nature. Hence, in applying Haynie, we must reverse the trial court's denial of summary disposition on the issue of sexual harassment.
>
> (Opinion, Exhibit 2, p. 9.) (citation omitted.)

The Court then addressed defendant's remand request based on the verdict form issue and correctly denied it for two reasons: (1) defendant waived the issue by approving the special verdict form at trial (Opinion, Exhibit 2, p. 12-13) and (2) since the verdict on plaintiff's sex discrimination claim and retaliation claim, which were upheld on appeal, and her sexual harassment claim, which was reversed, were based on the same conduct, the entire damage award was supported by the evidence. (Opinion, Exhibit 2, p.13.)

Defendant now applies to this Court for Leave to Appeal on these two issues, plus a third issue which was never raised below, in either the trial court or the Court of Appeals.

ARGUMENT

I. This Court Should Not Review Defendant's Argument Regarding an Alleged Defect in the Special Verdict Form, Where the Court of Appeals Properly Held That this Issue Was Waived in the Trial Court by Defendant's Express Approval of the Form.

Defendant first argues that it is entitled to a remand of this case back to the trial court for a retrial of damages. Defendant argues that remand is necessary because of an alleged defect in the special verdict form used at trial. In a nutshell, Defendant contends that Plaintiff proceeded on three theories of liability at trial: (1) sex discrimination; (2) sexual harassment; (3) retaliation. The special verdict form used at trial separated liability, thereby allowing the jury to determine liability on each theory. However, the form did not require the jury to separate damages according to theory of liability. It did, however, require the jury to separate past economic damages, future economic damages, past non-economic damages and future non-economic damages. A separate damage

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question was also asked with respect to Plaintiff's claims for assault against the Defendant Markey. Verdict Form, Exhibit 1.)

In the Court of Appeals, Defendant argued for the first time that since Plaintiff's sexual harassment claim was reversed as a result of the Court of Appeals' reliance on Haynie, supra, a remand to the trial court was necessary for a "re-calculation" of damages. Defendant's theory is that if one basis of liability, i.e., the sexual harassment, is removed, Plaintiff's damages would somehow be reduced.

The Court of Appeals correctly rejected this argument and affirmed the damage award, finding first and most important, that Defendant had waived this issue on appeal by not only failing to object to the special verdict form at trial, but actually approving same for use. The Court of Appeals found:

> "Defense counsel did not object to the special verdict that required findings on all three theories but did not separate out damage determinations per claim, or request a verdict form that required separate damage determinations per claim. In fact, ***after closing arguments, prior to instructing the jury, the trial court asked counsel for both parties if they had any comments regarding the jury instructions which included the special verdict form. Defense counsel made one comment regarding one of the instructions but did not object or make any comments about the special verdict form.*** Furthermore, when the trial court completed instructing the jury, upon questioning from the court, defense counsel explicitly stated that he had no objections to the jury instructions including the special verdict form." (Opinion, Exhibit 2, p. 12.) (Emphasis added.)

These findings are supported by the record. See Trial Transcript, Vol 7, pages 119-120, 135. Exhibit C. The Court of Appeals then went on to explain the legal basis for its decision, which again is exactly correct:

> MCR 2.516(C) provides that a "party may assign as error the giving of our failure to give an instruction only if the party objects on the record before the jury retires to consider the verdict."

* * *

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> MCR 2.514(A) states that if a special verdict form is required, the trial court shall settle the form of the verdict in advance of such argument and in the absence of the jury. As such, we find that Defendants have waived any claim of error concerning the apportionment of damages. (Opinion, Exhibit 2, pp. 12-13.)

In its Application for Leave to Appeal to this court, Defendant does not deny that it failed to object to the special verdict form at trial. Rather, Defendant seems to argue that its failure to object to the verdict form does not constitute a waiver. The argument is groundless. As the Court of Appeals stated in rejecting this argument:

> Our Supreme Court distinguished waiver and forfeiture, stating, "[w]aiver has been defined as the intentional relinquishment or abandonment of a known right.... One who waives his rights under a rule may not then seek appellate review of a claim deprivation of those rights for his waiver has extinguished any error. ....Therefore, because Defendant specifically stated it had no objection to the jury instructions and special verdict form, we find that it has waived review of any issue regarding the apportionment of damages claim. Because waiver has extinguished any error, we affirm both the economic and non-economic damages award in total despite a reversal of one of the three choices of recovery". (Citations and footnote omitted.) (Opinion, Exhibit 2, p. 13.)

Defendant attempts to avoid the proper application of the well-settled law regarding waiver by arguing that it did not waive a "known right" because it had no way of knowing, at the time of trial, that Plaintiff's sexual harassment claim would eventually be reversed on appeal. Again, the argument is baseless. Defendant filed a motion for summary disposition seeking dismissal of the sexual harassment claim and, at the close of Plaintiff's proofs, renewed that request as part of its motion for directed verdict. In fact, at the time the jury instructions were read and the verdict form was approved, that motion was still under advisement by the trial court. Finally, after the jury's verdict was returned, Defendant filed a motion for JNOV which again sought dismissal of the sexual harassment claim. Defendant cannot now seriously argue that it did not know that it was a possibility that at some point that claim, or any other claim for that matter, could be either dismissed by the trial court on one of the various pending motions or by the Court of Appeals at a later date.

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It is abundantly obvious that Defendant waived this issue below, the Court of Appeals fully exposed the fatal error made and this Court should not further review this issue.

II. Remand Is Unnecessary and Inappropriate in this Case Because the Evidence of the Same Conduct Supported the Jury's Verdict on All Theories of Liability and Fully Supported the Damage Award.

Defendant next argues that if it can somehow escape application of the waiver rule, remand would be necessary. Again, Defendant chooses to ignore the evidence introduced at trial and the correct reasoning of the Court of Appeals which relied upon that evidence. Plaintiff pointed out to the Court of Appeals at oral argument, that remand was not necessary for two reasons. First, the conduct which supported Plaintiff's sex discrimination claim was identical to the conduct which Plaintiff presented in support of her sexual harassment claim and supported. Second, a finding in favor of Plaintiff on any one of her theories of liability, standing alone, supported the entire award the Court of Appeals agreed and held:

> We note that as it relates to economic damages, even in the absence of waiver on the issue, remand on the issue of economic damages would not be required since [the jury found in favor of all three theories of recovery,] ***any one of which would support the award of economic damages in its entirety.*** Moreover, because the same conduct gave rise to the non-economic damages, regardless of whether that conduct was labeled sex discrimination or sexual harassment, the entire damage award is supported despite a reversal of the sexual harassment claim. (Opinion, Exhibit 2, p. 13, fn 2.) (Emphasis added.)

The Court of Appeals was clearly correct. Plaintiff has always maintained, both at trial and in the Court of Appeals, that the conduct giving rise to her sexual harassment and sex discrimination claims was identical. The sex harassment claim was never argued to be based upon harassment of a sexual nature, but rather based upon egregious, and as the Court of Appeals found "deplorable" gender-based discriminatory conduct. The jury was clearly informed in this regard. Plaintiff made this point during closing argument:

> We have also got a claim for the hostile environment in this case, and you are going to be instructed on the sexual harassment, hostile

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environment claim. It's a long instruction and it tells you that sexual harassment means, among other things-and we're not claiming that anybody propositioned her in this case. We're not claiming that anybody, you know, touched her body parts. It's not one of those sexual harassment cases....

* * *

That's what we claim happened in this case, and this tells you also the conduct or communication that we're complaining about to be of a sexual nature doesn't have to be motivated by sexual desire. It doesn't have to be touching the body parts or saying lewd sexual desire kind of comments. It must-we must show but for the fact of her sex, she wouldn't have been the object of the harassment. The gender biased comments are what we are talking about there. They were directed to her, ultimately reported to the management and nothing done. That's the sexual harassment. That's the hostile environment in this case." (Trial Transcript, Vol. VII, pp. 50-51.)

So, aside from the obvious and fatal waiver issue, the Court of Appeals correctly found an additional reasons to deny a Defendant's request for remand. The Court of Appeals concluded that (1) the conduct which gave rise to Plaintiff's sex discrimination claim was identical to the conduct which gave rise to the sexual harassment claim; and, (2) the evidence of this "deplorable" conduct, as well as the evidence of retaliation, supported the full damage award even with one theory of liability removed. Remand was therefore inappropriate. This Court should reach the same conclusion.

Defendant attempts to present, mainly through string citations, a number of cases which it claims support its argument that the appellate courts occasionally remand cases for redetermination of damages where a verdict form does not separate damages among various theories of liability. A careful review of this cases reveals, however, that they are of two varieties, neither of which applies in the present case. These cases either involve the use of general verdict forms, rather than a special verdict form as was used in the instant case, or they involved theories of liability which, by their definitions, required proofs of different types of conduct. For example, in Lalone v Rashid, 34 Mich App 193; 191 NW2d 98 (1971) and in Rock v Derrick, 51 Mich App 704; 216 NW2d 496 (1974),

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both prominently cited by Defendant, the Court of Appeals was reviewing a general verdict form rather than a special verdict form. Defendant is comparing apples and oranges. Here, the trial court did not require the parties to use a general verdict form which simply permitted the jury to find "yes or no" as to whether Plaintiff was entitled to any damages, then give a single opportunity to award a total damage figure. Rather, with Defendant's express consent, each theory of liability was set forth separately. Perhaps more important is that different types of damages (past, present, economic and non-economic) were set forth separately. This fact plainly sets this case apart from any of the cases cited in string form by Defendant which involved general verdict forms.

With respect to the nature of the conduct which gave rise to Plaintiff's claims, the primary case cited by Defendant actually supports Plaintiff's position in this regard. In Leavitt v Monaco Coach Corp., 241 Mich App 288, 302; 616 NW2d 175 (2000), the Court of Appeals specifically held that, though the jury was not permitted to apportion damages amongst theories of liability, remand was not necessary for recalculation of damages after appeal. There, the Court stated:

> Sometimes a remand is necessary to ascertain how the jury apportioned damages even in the absence of a timely request at trial. ...no such necessity is present in the instant case, where Plaintiff charged that the vehicle was not fit for the specific purpose for which he purchased it, and where he made no attempt to quantify the damages attributable to each basis for the vehicle's unfitness.
>
> Id. at 241 Mich App 302 (Citations omitted.)

Finally, on point is an unpublished opinion of the Court of Appeals which is instructive to this Court. In Ropp v Wurtsmith Community Federal Credit Union, 1996 WL 33364641(Mich App)(decided April 19, 1996) (Exhibit 3), the Court of Appeals considered a case in which Plaintiffs alleged that they suffered damages as a result of discrimination and intentional infliction of emotional distress. At trial, a special verdict form was used for each Plaintiff which separated questions of liability based upon the theories of liability and separated damages between economic

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and non-economic, but, as in the instant case, did not separate damages amongst the various theories of liability.

Defendant, on appeal, sought reversal of the intentional infliction of emotional distress claim. Although the Court of Appeals found that the basis for liability on this theory was "questionable" it did not believe that reversal was warranted. The jury found in favor of the Plaintiff on both the intentional infliction of emotional distress and discrimination theories, the conduct giving rise to these claims were identical and the damages, therefore, not severable. The Court of Appeals reasoned:

> As noted above, the law provides for the recovery of emotional distress damages by Plaintiffs who experience discrimination. The jury in this case expressly found that Plaintiffs Kutzera and Morgan both sustained emotional distress damages on account of discrimination. There is no indication in the record that either Kutzera or Morgan sought to recover damages for intentional infliction of emotional distress on the basis of conduct that was not also alleged to be discriminatory. Indeed, Defendant's approval of the verdict forms and failure to request separate damage awards for the two different theories of liability, reflect Defendant's acknowledgment that any award of emotional distress damages could be either predicated upon a finding of liability *for either* discrimination or *intentional infliction of emotional distress*. Under these circumstances, and because the jury expressly found that Kutzera and Morgan both sustained emotional distress damages on account of discrimination, we find that any error in submitting the intentional infliction of emotional distress claims to the jury was harmless.
>
> (Id. at p. 5.)(Emphasis in original.)

The same result is mandated here. As fully set forth above and in the Court of Appeal's own well-reasoned opinion, since the conduct that gave rise to Plaintiff's sexual harassment and sex discrimination claims in this case are identical and because the evidence of Defendant's conduct was sufficient to support the full damage award on any one of the three theories of liability, remand would be inappropriate.

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This Court should therefore decline to review this issue and let stand the Court of Appeals' affirmance of the trial court's judgment on Plaintiff's sex discrimination and retaliation claims.

III. There Is No Basis for Remanding this Case for a Recalculation of Attorney Fees Where the Issue Is Not Preserved for Appeal and Where the Court of Appeals Correctly Held That the Same Facts Supported Each of Plaintiff's Claims.

Defendant also claims that it is entitled to a remand of this case back to the trial court for a redetermination of attorney fees. Defendant argues that Plaintiff can only recover attorney fees as to those claims on which she prevails. Since Plaintiff's claim for sexual harassment was reversed on appeal, Defendant argues that this should reduce Plaintiff's attorney fee award.

A. This Issue Is Not Properly Preserved For Appeal Because It Was Not Raised In The Court of Appeals.

This issue is not preserved for appeal and should not be considered by this Court. In the Michigan Court of Appeals, the only fee cost issue argued by Defendant was whether or not costs plaintiff could recover under the Elliot-Larsen Civil Rights Act, MCLA 37.2802, were "taxable costs".

Defendant did not argue, either in its brief presented at the Court of Appeals or during oral argument, that if Plaintiff's sexual harassment verdict were to be reversed in light of Haynie, supra, it would be entitled to a remand and the reduction of Plaintiff's attorney fee award. Further, once the Court of Appeals issued its opinion, Defendant did not file a motion for re-hearing or any other motion seeking to address the attorney fee issue. This issue should therefore not be considered because it is not preserved for appeal. It is well-settled that a question may not be raised for the first time on appeal to this Court. Swartz v Dow Chemical Co, 414 Mich 433, 446, 326 NW2d 804 (1982); Long v Pettinato, 394 Mich 343, 349, 230 NW2d 550 (1975).

B. Plaintiff Is Entitled to the Full Fee Award Where Her Sex Discrimination and Sexual Harassment Claims Involved Identical Proofs.

Should this Court elect to review this unpreserved issue, it must nevertheless find that Defendant is not entitled to a remand for the purpose of redetermining Plaintiff's attorney fee award.

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Defendant essentially argues in its Application for Leave that since Plaintiff was only ultimately successful on her sex discrimination and retaliation claims, and unsuccessful on her sexual harassment claim, the attorney fee award should be reduced. There is no support for this argument. As set forth more fully above, the evidence presented in trial in support of Plaintiff's sex discrimination claim was virtually identical to the evidence introduced on her sexual harassment claim. The finding of the Court of Appeals in this regard bears repeating:

> "...because the same conduct gave rise to the non-economic damages, regardless whether that conduct was labeled sex discrimination or sexual harassment, the entire damage award is supportive despite our reversal of the sexual harassment claim." (Opinion, Exhibit 2, p. 13, fn 2.)

Similarly, since the evidence of sex discrimination and sexual harassment was identical, it is axiomatic that preparation of these two claims for trial were concurrent and cannot be divided or segregated. Had Defendant's Motion for Summary Disposition on Plaintiff's sexual harassment claim been granted prior to trial, trial preparation would not have been different. The same witnesses would have been prepared and examined, the same exhibits prepared and introduced, etc. Defendant has offered no factual support for this argument and the law is to the contrary. Where pretrial costs and efforts put forth by Plaintiff's counsel would be substantially the same whether or not a particular claim or theory of liability is raised, a trial court is not required to apportion fees according to the number of claims actually won. Grow v W.A. Thomas Company, 236 Mich App 696, 715; 601 NW2d 426 (1999).

In light of the Defendant's failure to preserve this issue for further appeal and its failure to demonstrate that attorney fees incurred in this matter would have been different had Plaintiff's sexual harassment claim been dismissed before trial, Defendant's Application for Leave to Appeal on this issue should be denied.

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RELIEF

For all of the reasons set forth above, Plaintiff-Appellee, Barbara Stanisz, respectfully requests that this Court deny Defendant-Appellants' Application for Leave to Appeal.

Respectfully submitted,

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